John G. Balestriere
David A. Forrest
Matthew W. Schmidt
BALESTRIERE FARIELLO
225 Broadway, 29th Floor
New York, New York 10007
Telephone: (212) 374-5401
Facsimile: (212) 208-2613
john.balestriere@balestrierefariello.com
david.forrest@balestrierefariello.com
matthew.schmidt@balestrierefariello.com
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HILLARY LAWSON, KRISTINA HALLMAN, STEPHANIE CALDWELL, MOIRA HATHAWAY, MACEY SPEIGHT, ROSEMARIE PETERSON, and **LAUREN FULLER,**

Plaintiffs,

– against –

HOWARD RUBIN, JENNIFER POWERS, and the **DOE COMPANY,**

Defendants.

Case No.: 1:17-cv-06404 (BMC)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT POWERS' MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PRELIMINARY STATEMENT[1]

The Court should deny the Motion for Reconsideration brought by Defendant Powers (the "Motion"), which claims that the Court overlooked caselaw and evidence which the Court in fact explicitly considered after 259 pages of briefing by all parties before it rendered the decision denying Powers's Motion for Summary Judgment. (Memorandum Decision & Order, Dkt. No 290 (the "Decision.") The evidence is sufficient for the remaining claims to go to a jury, and none of Powers's rehashed arguments come close to showing, as Powers claims, that the Court "clearly erred." The Court overlooked no law or facts Powers raises, such that the Motion should be denied.

Regarding purportedly overlooked facts (the only facts relevant on a motion to reconsider) Powers devotes much of her brief to discussion of two text messages, but those were both previously put before and considered by the Court. (Reply Memorandum of Law in Further Support of Powers's Motion for Summary Judgment, Dkt. No. 270 ("Powers's Summary Judgment Reply") at 4; Decision at 12–13.) As to supposedly overlooked law, Powers devotes significant space to a decision (she nonetheless misinterprets), *United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010), which, again, the Court considered. (Decision at 12–13.) Both Powers and Rubin put *Marcus* before the Court, along with the other authority Powers cites to her in Motion. Nothing Powers cites to in the Motion was overlooked, warranting denial of the Motion without even considering the merits of Powers's arguments.

Moreover, Powers's hearsay and Federal Rule of Evidence ("FRE") 403 balancing arguments are improperly raised for the first time in the Motion, such that such argument should not be considered. The Court properly considered the text messages sent by Powers, which are

[1] All terms are as defined in Plaintiffs' Second Amended Complaint (Dkt. No. 161) and Plaintiffs' Motion for Partial Summary Judgment, (Dkt. No. 234-1 ("P's MSJ Brief")) unless otherwise defined herein. Plaintiffs provide some definitions for the Court's convenience.

admissible as against her as opposing party statements under FRE 801(d)(2)(A), and because their probative value substantially outweighs any prejudice that Powers purportedly suffered.

In any event, the two text messages at a minimum raise triable issues of fact as to whether Powers knew that Rubin was not engaging in consensual sex but, instead, assault, rape, and in a Human Trafficking Venture from which Powers handsomely benefited, and frankly enjoyed. Indeed, while the text messages Powers focuses on were not overlooked by the Court (and thus not relevant on this Motion) they anyway show that Powers knew exactly what was going on in the Human Trafficking Venture. In one text, relating to a sexual encounter with Plaintiff Speight, Powers remarked: "You beat a hot girl and got laid! What's there to be upset about!!" (Exhibit E to the Declaration of John G. Balestriere in Opposition to Defendants' Motions for Summary Judgment, Dkt. No. 258-7 at JP_0000026 (the "January 27, 2016 Text").) In the second text, Powers responded to a picture Plaintiff Hallman sent to Powers of former Plaintiff Caldwell's seriously injured breasts after Rubin beat Caldwell. Powers wrote: "[emoji][emoji][emoji] I know. Speaking to her now Thank you for being a good friend . . . She'll be OK, don't worry. [emoji] . . . Are you with [Caldwell] now? . . . I need her address, want to send her some stuff I've found to be helpful." (Exhibit 10 to the Declaration of Jolene F. Lavigne-Albert in Support of Jennifer Powers' Motion for Summary Judgment, Dkt. No. 242-10 at 3 (the "September 26, 2016 Text").) These texts, considered by the Court, just as *Marcus*, and the other authority Powers puts again before the Court, warranted denial of Powers's Motion for Summary Judgment. Powers points to nothing which the Court ignored or overlooked, warranting denial of the Motion.

LEGAL STANDARD

The standard for a motion for reconsideration is "strict" as "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court

overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Memory Film Prods. v. Makara*, No. CV-05-3735 (BMC), 2009 WL 10705897, at *1 (E.D.N.Y. Feb. 3, 2009). Motions for reconsideration are "narrowly construed" in order to "avoid repetitive arguments already considered by the Court" such that the moving party may not "advance new facts, issues or arguments not previously presented to the Court." *Alex Meat & Provision, Inc. v. Alex's Meat Distribs. Corp.*, No. 09-CV-2783 (JG), 2009 WL 10706346, at *1 (E.D.N.Y. July 17, 2009); *Ferguson v. City of New York*, 17-cv-4090 (BMC), 2018 WL 3626427, at *1 (E.D.N.Y. July 30, 2018) (Cogan, J.) (denying plaintiff's motion for reconsideration because plaintiff "simply rehashes the same arguments he made in support of his motion for summary judgment").

ARGUMENT

I. THE COURT CONSIDERED THE EVIDENCE ON WHICH POWERS WRONGLY RELIES, WARRANTING DENIAL OF THE MOTION

The Court considered the text messages which she claims the Court overlooked. In determining that a triable issue of fact existed regarding whether Powers was aware of Rubin's beating and rape of his victims, and the extent of the injuries which he caused Plaintiffs, the Court considered a tremendous amount of evidence (including 250 exhibits submitted by all parties). Such evidence included two text messages from Powers—the January 27, 2016 Text, in which Powers joyfully remarked: "You beat a hot girl and got laid! What's there to be upset about!!"; and the September 26, 2016 Text, in which Powers acknowledges that one of Rubin's victims was seriously injured and that she even knew of some treatment for the injuries which would be "helpful." (January 27, 2016 Text; September 26, 2016 Text.) Moreover, each party extensively briefed the issue of whether or not the two text messages support a reasonable inference that Powers knew or should have known of Rubin's coercion, and the Court explicitly relied upon the

text messages in holding that the evidence supported such an inference. (Powers's Summary Judgment Reply at 4; Plaintiffs' Memorandum of Law in Opposition to Defendant Powers's Motion for Summary Judgment, Dkt. No. 258 ("P's Opp. to Powers's Motion") at 1, 4, 11, 22, 28.) The Court did not overlook this evidence such that the Motion should be denied.

II. THE COURT CONSIDERED THE AUTHORITY ON WHICH POWERS WRONGLY RELIES, WARRANTING DENIAL OF THE MOTION

A. The Court Considered, and Distinguished, *United States v. Marcus* in Denying Powers's Motion for Summary Judgment

The Court considered and distinguished *Marcus* in determining that triable issues of fact regarding Powers's knowledge precluded summary judgment. Indeed, not only did the Court explicitly consider *Marcus*—the case that Defendant contends the Court overlooked—but in its decision referenced the *exact language* that Powers now claims the Court overlooked. (*Compare* Motion at 3 (claiming Court ignored Second Circuit authority that "consensual BDSM activities alone [cannot] constitute the basis for a violation of the TVPA") (citing *Marcus*, 628 F.3d at 45)), *with* Decision at 12 ("as Powers notes . . . 'consensual BDSM activities alone could not constitute the basis for' a violation of the TVPA") (quoting *Marcus*, 628 F.3d at 45)).) The Court even noted in its Decision that "all parties cited to *Marcus* throughout summary judgment briefing." (Decision at 12–13 (citing *Marcus*, 628 F.3d at 45.) *Marcus* was well-considered by the Court, such that the Motion should be denied.

B. The Court Also Considered the Only Other Authority Powers Cites, Warranting Denial of the Motion

Besides *Marcus*, the Court considered the only other authority that Powers claims the Court overlooked. Like *Marcus*, the Court explicitly considered *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which was (again like *Marcus*) both briefed by each of the parties and cited by the Court in its Decision. (Decision at 4; Defendant Jennifer Powers' Memorandum of Law in

Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 255 ("Powers's Opposition to P's Motion") at n.5; Memorandum of Law in Support of Defendant Howard Rubin's Motion for Summary Judgment at 42; P's Opp. to Powers's Motion at 10; Plaintiffs' Memorandum of Law in Opposition to Defendant Rubin's Motion for Summary Judgment, Dkt. No. 259 at 19.) The Court also considered *Cruz v. Reiner*, No. 11 CIV. 2131 BMC, 2013 WL 5676303, at *5 (E.D.N.Y. Oct. 16, 2013), another case simply quoting the relevant language of *Anderson*, which Rubin cited on reply. (Reply Memorandum of Law in Further Support of Defendant Howard Rubin's Motion for Summary Judgment, Dkt. No. 286 at n.4.) The Motion should be denied.

III. POWERS IMPROPERLY MAKES A HEARSAY ARGUMENT FOR THE FIRST TIME ON RECONSIDERATION, SUCH THAT THE COURT DID NOT OVERLOOK SUCH AUTHORITY

Powers's hearsay and FRE 403 arguments are improperly raised for the first time on a motion for reconsideration, such that the Court did not overlook such authority in denying Powers's motion for summary judgment. A party moving for reconsideration may not "advance new facts, issues or arguments not previously presented to the Court." *Winkler v. Metro. Life Ins. Co.*, 340 F. Supp. 2d 411, 413 (S.D.N.Y. 2004). Powers did not raise any hearsay or FRE 403 arguments in her summary judgment papers, such that she may not do so now.

In any event, the Court properly considered Powers's text messages, which are excluded from the definition of hearsay as opposing-party admissions, the probative value of which substantially outweighs any alleged prejudice suffered by Powers. Under FRE 801(d)(2)(A), a statement is not hearsay when it is made by a party. *See also Riisna v. Am. Broad. Cos.*, 219 F. Supp. 2d 568, 572 (S.D.N.Y. 2002) (emails sent by party opponents constitute admissions and are not hearsay). FRE 403 only excludes evidence where the prejudice is "unfair." *Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164, 174–75 (2d Cir. 2000) (affirming admission of evidence under FRE 403). Both of the text messages upon which the Court relied in its Decision were sent

by Powers, and Powers's prejudice arguments are improperly raised for the first time on a motion for reconsideration, warranting denial of the Motion.

CONCLUSION

The Court should deny the Motion, since the Court did not overlook any evidence nor controlling law in rendering its Decision. The Court did not overlook *Marcus*, or any other authority or evidence that Powers raises, but, in fact, considered everything raised in Powers's Motion in its Decision. And, even if Powers's hearsay and FRE 403 objections were properly before the Court—which they are not—these objections fail as the text messages are admissible as opposing party admissions, and Powers cannot point to any unfair prejudice that they impose upon her. The Court should deny the Motion, and this action continue to proceed to trial.

Dated: New York, New York
August 23, 2019

By: _____

John G. Balestriere
David A. Forrest
Matthew W. Schmidt
BALESTRIERE FARIELLO
225 Broadway, 29th Floor
New York, New York 10007
Telephone: (212) 374-5401
Facsimile: (212) 208-2613
john.balestriere@balestrierefariello.com
david.forrest@balestrierefariello.com
matthew.schmidt@balestrierefariello.com
Attorneys for Plaintiffs